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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

KAREN STEPHANIE JOHNSON,

Defendant and Appellant.

B165192

(Los Angeles County
Super. Ct. No. LA040715)

APPEAL from a judgment of the Superior Court of Los Angeles County,
John S. Fisher, Judge. Reversed.

Harry I. Zimmerman, under appointment by the Court of Appeal, for
Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General,
Mary Sanchez and Steven D. Matthews, Deputy Attorneys General, for Plaintiff
and Respondent.

Karen Stephanie Johnson appeals from judgment entered following revocation of probation. Sentenced to two years in prison for identity theft (Pen. Code, § 530.5, subd. (a)), she contends she was denied due process and her constitutional right to confrontation when the trial court admitted hearsay evidence as the basis for violating her probation. She also contends the trial court abused its discretion and denied her due process when the court denied her request for a continuance to secure the presence of a witness. For reasons explained in this opinion, we reverse the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Deputy probation officer Theresa Gutierrez supervised appellant and submitted a report dated January 22, 2003 to the trial court indicating she had evidence that appellant was in violation of her probation. Gutierrez based this statement on the receipt of four noncompliance reports from Belinda Ortiz, appellant's case manager at Sentinel Monitoring Program. Gutierrez brought these four noncompliance reports to the court and testified regarding their contents. Compliance report number 1 stated that on December 3, 2002, the case manager received an exception report indicating that appellant conducted an unapproved leave on December 2, 2002. Without prior authorization, she left her residence at 11:44 a.m. and returned six hours and 38 minutes later. Conducting unauthorized activity is a violation of the program rules and regulations. Noncompliance report number 2 stated that at her scheduled weekly appointment on December 5, 2002, appellant failed to provide the required documents to verify her probation appointment on December 4, 2002; and without documentation, Sentinel Monitoring could not verify appellant's whereabouts. Noncompliance report number 3 stated that on December 18, 2002, appellant failed to appear for her scheduled weekly compliance appointment with her case manager.

Noncompliance report number 4 stated that on December 27, 2002, appellant failed to appear for her scheduled weekly compliance appointment with her case manager. Compliance appointments are scheduled in order for appellant to provide documentation, and failure to keep such an appointment is a violation of program rules. Another two-page document submitted to the court was a report and status sheet which substantiated noncompliance report number 2.

Gutierrez testified she had spoken with Ortiz from Sentinel Monitoring Program by phone but could not recall the date of the conversation. She did not know how late the monitoring program was open or the hours during which appointments could be made. Gutierrez was not aware that appellant was working during the time she was released on this monitoring program. Gutierrez did not ask appellant if she was working or how she was getting to her appointments. Other than what she read regarding these alleged violations, she had no personal knowledge that appellant was not in compliance. Gutierrez did not know where the monitoring equipment was installed. She had not encountered any problems with the system determining the authorized or unauthorized leaves of the person on the monitoring program. She had not talked to anyone at the Sentinel Monitoring Program to determine if they were aware of any problems. Gutierrez had not seen any surveillance documents regarding any unauthorized leave. She did not know whether any technician had gone to appellant's home to check the monitoring equipment for accuracy. But for the notification she received from Sentinel Monitoring Program, she would not have reason to violate appellant. However, on January 14, appellant failed to show up for a financial evaluation appointment. Appellant never told Gutierrez that she was working and could not make that appointment.

Appellant objected to the introduction of the reports claiming they were hearsay, they had not been authenticated, and there was a lack of foundation.

Respondent argued the documents were admissible at a probation violation hearing and hearsay was acceptable. The court thereafter asked the parties to research to what extent hearsay was admissible at a probation violation hearing. Respondent requested that the matter be continued in order to prepare a written brief on the issue and stated it would subpoena the author of the reports that had been marked for identification in the case. The matter was continued and the court suggested that the prosecution “have the person here . . . unless you find the hearsay[] admissible.” The prosecution noted that in an abundance of caution it was going to make every effort to have the person in court either way. “If [the respondent] get[s] a favorable ruling obviously [it will] thank her very much and excuse her.” “And if I don’t, she’ll be available.”

Several days later, the prosecution submitted points and authorities on the issue. The defense argued that while hearsay was admissible in a probation violation hearing, such hearsay had to be reliable and inherently trustworthy; there had been problems with the electronic monitoring program and the prosecution had not presented evidence that was reliable or inherently trustworthy. After the court found the reports to be reliable hearsay and received them into evidence, the prosecution rested.

When appellant was given the opportunity to present her evidence, her counsel stated he “would like to get the person from the electronic monitoring program here.” Counsel stated he had not talked to her personally but through other contacts had been informed that the information in the reports was not all correct. Counsel argued the court should rely upon the “person” rather than “some hearsay statements.” The court refused to continue the matter, stating, “This is the time and place for the hearing. Everybody had notice of the hearing.” Defense counsel stated it was his understanding the prosecution was going to subpoena the witness. Defense counsel stated he had tried to call the witness but had not yet

received a call back from Miss Ortiz. The court reminded counsel the matter had already been continued but offered to let counsel make a second call to see if Ortiz could give him some information. The court stated it would take “her hearsay just as easily as [it] took the [prosecution’s] hearsay. But the bottom line is we’re going to conclude this today.” The defense then submitted the matter. The court found appellant in violation of probation and sentenced her to the mid-term of two years.

I

In *People v. Maki* (1985) 39 Cal.3d 707, our Supreme Court concluded that at a probation revocation hearing, documentary hearsay evidence which did not fall within an exception to the hearsay rule was admissible if there was sufficient indicia of reliability regarding the proffered material. The court reviewed approaches taken in other cases and observed instances where reports were deemed trustworthy and reliable and, therefore, worthy of consideration. These reports included laboratory reports from a company whose business required it conduct such tests and letters from individuals whose jobs required that they monitor an appellant’s behavior. (*Id.* at p. 715.) Additionally, the court noted that in the absence of any evidence tending to contradict the accuracy of lab tests, appellant’s confrontation rights were not infringed. (*Id.* at p. 717.)

As our Supreme Court observed in *People v. Arreola* (1994) 7 Cal.4th 1144, where the prosecution unsuccessfully attempted to use a witness’s preliminary hearing transcript at a probation revocation hearing in lieu of presenting live testimony, “There is an evident distinction between a transcript of former live testimony and the type of traditional ‘documentary’ evidence involved in *Maki* that does not have, as its source, live testimony. [Citation.] . . . [T]he need for confrontation is particularly important where the evidence is testimonial, because

of the opportunity for observation of the witness's demeanor. [Citation.] Generally, the witness's demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts, where often the purpose of this testimony simply is to authenticate the documentary material, and where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action.” (*People v. Arreola, supra*, 7 Cal.4th 1144, 1157, fn. omitted.)

In the present case, we conclude the four noncompliance reports and the two-page report substantiating report number two were properly received into evidence and provided sufficient bases for the court to revoke probation. The reports were the regular reports of the Sentinel Monitoring Program whose business was to conduct such monitoring and prepare such reports for probation officers. Further, there was no evidence contradicting the noncompliance reports or the accuracy of the monitoring equipment.

II

Appellant contends the trial court abused its discretion when it refused appellant a continuance to secure the presence of the author of the electronic monitoring company's non-compliance reports. We agree.

“[T]he trial court has broad discretion to determine whether good cause exists to grant a continuance of the trial. [Citations.] A showing of good cause requires a demonstration that counsel and the defendant have prepared for trial with due diligence. [Citations.] When a continuance is sought to secure the attendance of a witness, the defendant must establish ‘he had exercised due diligence to secure the witness’s attendance, that the witness’s expected testimony

was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven.’ [Citation.] The court considers ““not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.”” [Citation.] The trial court’s denial of a motion for continuance is reviewed for abuse of discretion. [Citation.]” (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

Here the trial court abused its discretion in denying the motion for continuance. The trial court had suggested to respondent that respondent make the witness available at the next hearing date if research proved the hearsay evidence inadmissible and respondent stated in an abundance of caution it would do all that it could to have the witness available even if such hearsay evidence was admissible. Appellant attempted to obtain the presence of the witness and it can be inferred from respondent’s representation previously that respondent too made every effort to have the witness present in court, but was unable to. Moreover, the expected testimony from Ortiz would have been material and not cumulative. Appellant’s counsel had information that the reports were not correct and accurate. Certainly any burden on this witness to appear in court would have been minimal in view of the nature and purpose of the business of Sentinel Monitoring. The trial court’s failure to grant a continuance here was a prejudicial abuse of discretion, and the matter must be remanded to the trial court to conduct a new probation revocation hearing.

DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings.

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CURRY, J.

We concur:

EPSTEIN, Acting P.J.

HASTINGS, J.